UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-840935-D1
AND LICENSE NO. 482304
Issued to: Robert A. Thomas

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2150

Robert A. Thomas

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 15 May 1978, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for three months on twelve months' probation, upon finding him guilty of misconduct. The two specifications found proved allege that while serving as first assistant engineer on board the United States SS BALDBUTTE under authority of the license above captioned, on or about 25 and 26 January 1978, while the vessel was shifting berths in Long Beach, Appellant did wrongfully fail to perform his duties as first assistant Engineer by being absent from the vessel without leave.

The hearing was held at Long Beach from 22 February 1978 to 8 May 1978.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of BALDBUTTE, and the testimony of witnesses taken at hearing and on deposition by written interrogatories.

In defense, Appellant offered in evidence his own testimony and that of other witnesses.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on 17 May 1978. Appeal was timely filed and perfected on 23 October 1978.

## FINDINGS OF FACT

On 24, 25, and 26 January 1978, Appellant was serving as first assistant engineer on board the United States SS BALDBUTTE and acting under authority of his license. BALDBUTTE arrived at Long Beach, California, on 24 January 1978. A shift of berth from San Pedro to Wilmington was scheduled for the morning of 25 January.

Aware of this scheduled shift, Appellant made an arrangement about 2300 on that night for the second assistant engineer to handle the duties of the first assistant in connection with the morning shift. Appellant had no watches scheduled until 27 January. He departed from the vessel. On the morning shift the second assistant performed the duties normally performed by the first assistant. No other arrangement was made by Appellant.

The vessel shifted twice more, on the evening of 25 January and the morning of 26 January, before Appellant returned aboard. Appellant, as first assistant engineer, had a duty to be present for each in-port shift of berth or to have a proper replacement arranged for.

## BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that this was a matter of labor-management dispute, outside the scope of activity set by policy at 46 CFR 5.03-20, and that the findings are not supported by substantial evidence.

APPEARANCE: Bodle, Fogel, Julber, Reinhardt, Rothschild & Feldman, Los Angeles, California, by Clark Aristei, Esq.

## OPINION

The statement of policy at 46 CFR 5.03-20 makes it clear that the cloak of a "labor dispute" does not cover conduct which is violative of a seaman's obligations under the law while in the service of a vessel under authority of his seaman's license or certificate. A seaman who is bound by legally constituted articles of agreement may not fail or refuse to obey lawful orders during the existence of the lawfully incurred obligation.

There is no doubt that Appellant had voluntarily undertaken the agreement to serve aboard BALDBUTTE at New Orleans, Louisiana, on 3 January 1978, and that the agreement had not been terminated at the time in question. He was, on 25 and 26 January 1978,

serving aboard BALDBUTTE under authority of his license and was required to perform duties and obey orders lawfully assigned or directed to him in the course of his service.

II

There is direct conflict between testimony given against Appellant and that given in his behalf on two factual matters. One has to do with the question of the chief engineer's knowledge that Appellant would be off the ship during its stay in the Los Angeles area. The other is with respect to whether the second assistant engineer agreed to handle duties in connection with shifting the vessel on only one occasion, specifically that of the morning of 25 January 1978, or on any occasion when a shift might take place. On both issues the trier of facts resolved the conflict against Appellant.

The chief engineer categorically denied that any representation had ben made to him at all, prior to Appellant's departure from the vessel, with respect to the duration of Appellant's absence and the performance of licensed engineer duties in the course of shifts of the vessel in the Los Angeles area. To the contrary, Appellant declared that he had discussed such matters with the chief engineer while at sea prior to the vessel's arrival. Well before the hearing, Appellant cited the second assistant engineer as a witness to such discussions. No compelling reason to doubt the chief engineer arises in the course of his examination or cross-examination at hearing and the evaluation of the trier of facts as to credibility is not so clearly wrong as to be disturbed. This view is supported by the absence of support from Appellant's version from the second assistant engineer who denied any discussion of the matter with him at any time other than when he was specifically asked to take the duties for the morning of 25 January. (The second assistant elaborated upon this by stating that he had indeed been assured by Appellant that he would be back aboard the vessel after the 25 January morning shift.)

The acceptance of the trier of facts that Appellant asked only for standby on the morning shift of 25 January over Appellant's vaguer version that he had, incidental to asking the second to cover on that morning, also asked him to cover for all possible, then unscheduled shifts, was not clearly erroneous either.

Despite these resolutions the case against Appellant comes perilously close to failing utterly.

III

The handling of the specifications themselves and the findings made on them in this case require analysis before it can be concluded that the ultimate findings are affirmable.

There was, in addition to the specifications found proved dealing with shifts of the vessel at 2000 on 25 January and 0800 on 26 January 1978, another dealt with a shift at 0900 on 25 January 1978. This specification was dismisses for lack of proof. All three specifications were couched in identical language except for the detail of time, date, or both. Each contained the jurisdictional assertion that Appellant was serving as first assistant engineer aboard BALDBUTTE under authority of his license. Each then, having alleged the service generally, went on that Appellant did:

> "While said vessel was shifting berths in Long Beach, wrongfully fail to perform your duties as First Assistant Engineer by being absent from your vessel without leave."

This statement, at first reading, especially in light of the record which shows without question a single protracted absence for the entire period, seems to imply that there was an unauthorized absence as a result of which Appellant failed to perform the duties which normally attached during the period of absence. If this is so, each allegation was susceptible of proof in either of two ways. One is at full face meaning. The other would survive a showing that there was no absence from the vessel at all, merely a non-performance of duty while on board. There could be, of course, a combination of an authorized absence and a simultaneous failure to perform a duty on board.

The dismissal of the one specification constitutes a dual finding with respect to that matter: (1) there was no unauthorized absence, and (2) there was no wrongful failure to perform a duty, absence or no absence.

Assuming, as it is necessary to assume, that the essential character of the absence did not change (e.g., that a period of authorized absence had not expired in the interval), then the finding of unauthorized absence was wrong with respect to the specifications found proved, the complete dismissal of the one specification was an error (not curable on this state of the case), or a different reading must be given to the specifications. The possibility of this last is raised by the unusual specificity of the allegation, in addition to the general jurisdictional statement of service "as first assistant engineer," of a failure to perform the duties of "first assistant engineer."

It must be noted here that as far as Appellant's superior was concerned his conduct in the course of all three events was the same: whatever was done was done without the knowledge or consent of the chief. It is noted also that on the findings made initially there was only one distinction between the specification dismissed and those proved: that in one instance Appellant had deliberately procured a replacement while as to the other two shifts he did precisely nothing. It must be presumed also that, while the second assistant engineer performed certain functions on the first shift of the vessel at express behest of Appellant, someone (the second assistant or another) did in fact perform the duties on the other two shifts of berth although without any intervention, action, or assistance of Appellant.

Here it is necessary to note a lack of precision in the direction of the testimony elicited from witnesses, reflected in part by a specific finding of fact made in the initial decision.

IV

The chief engineer was questioned as to whether he had given orders or had a policy as to whether, if an engineer officer had a watch while in port, he had to check out with the chief "if he was going to miss the watch." The testimony was that there were no orders but that there was such a policy. It was not stated how this policy was made known to anyone and, in fact, the second assistant engineer testified, as a witness against Appellant, that there was no such policy although he acknowledged that a person with a watch would as a matter of course check out with the chief if a change of watchstander was made. The second also testified that there was just no policy at all about an engineer officer leaving the vessel when he did not have a watch.

The important thing here is that the attention of the primary witness, the chief, was directed only to the case of an engineer with a "watch." It is clear that Appellant had no "watches" during the time in question.

At this point I must quote and comment on the specific relevant finding in the initial decision:

> It was the policy aboard the vessel that the First Assistant Engineer be present during all shifts of the vessel. Respondent was not due to go on watch again until 26 or 27 January; however, he was aware that the vessel was scheduled to shift berths the following morning [25th]."

There are three troublesome things about this finding. There was no testimony at all from the chief engineer about "policy" on

shifting berths. (The second's testimony on the matter will be dealt with below). That Appellant was not due to go on watch again until 26 or 27 January is too vague a finding, with the twenty sixth being a date peculiarly in issue and the confusion in the situation over the concept of "watch". Appellant is entitled to a finding that he had no "watch" scheduled for 26 January and I have so found. The third matter is the emphasis placed on Appellant's awareness of the shift on the morning on 25 January with absolutely no reference at all, anywhere in the findings, as to his position vis-a-vis that other two shifts which come later. There was acknowledgement by the chief engineer that there was no schedule of or notification of future shifts on the evening of 24 January.

Returning now to the testimony of the second assistant, I note that he was asked to describe the duties of "first assistant engineer" during a shifting maneuver and he did so. To describe the functions performed by a first assistant engineer at a time of shifting berths does not of itself establish that this first assistant in this given case had to perform these functions or else be derelict to the point of misconduct. In fact, the functions were on the morning of 25 January 1978 performed by the second assistant himself and the initial decision finds this appropriate to the extent of holding no misconduct Appellant's part.

The testimony of the second assistant did not tend to establish a "policy" aboard BALDBUTTE that the first assistant normally had a duty to be present for shifts but only that there were certain functions which would be performed by a first assistant engineer or whoever else was in fact performing them. In the absence then of testimony from the chief that there was a known policy with respect to the first assistant and the shifting of berths the case has not yet been made out. There is not, up to this, any showing that Appellant had been apprized of later specific shifts during the period when he had no "watches" scheduled, or that he had a duty to have ascertained before leaving the vessel whether shifts were to be expected necessitating his presence on board.

V

It is here that I find the official log book entry enlightening and influential. Appellant declared, when confronted with the report by the chief engineer that he had missed three shifts, that he had secured the services of the second assistant for any shift that might occur during the stay on the Los Angeles area. This was probatively denied by the second assistant who specifically limited the agreement to performance at the morning shift of 25 January. It may reasonably be inferred from Appellant's insistence that he had covered the entire period in the

Los Angeles area that he was aware of a policy that the first assistant perform at all shifts of berth unless acceptable arrangements were made for a substitution by another qualified person.

## CONCLUSION

There can be no doubt, despite in artfulness of the precise allegations and the casual omissions from the initial findings, that there was an issue of Appellant's performance of duty in connection with two shifts of berth of BALDBUTTE on 25 and 26 January 1978 properly litigated on adequate notice with Appellant's chosen present throughout the proceedings. I conclude that what was correctly established was that Appellant, as first assistant engineer of BALDBUTTE, had a duty to ascertain, prior to leaving the vessel, the schedule of the vessel while it was in the Los Angeles area, and that having failed to do so he failed either to perform duties in connection with two shifts of berth by the vessel or to secure a proper replacement for the performance of those duties. The case was not presented, and need not be considered, that Appellant's conduct was knowing or specifically deliberate as to the two shifts of berth that he missed.

## ORDER

The order of the Administrative Law Judge dated at Long Beach, California, on 15 May 1978, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D. C., this 20th day of MARCH 1979.

INDEX